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LUNCHEON

THE TYDINGS BILL

BY A. LEE SANDERS†

BEFORE LAUNCHING into the subject matter it is important to briefly indicate where we are going and how we intend to arrive at our destination. At the outset, let me say that it would be presumptuous for me to pontificate and opine about the good and evil aspects of the various bills submitted by Senator Tydings. A great deal has been said and written about the various bills, and my purpose here will be to briefly summarize the substantive and procedural provisions of the latest bill and to juxtapose the alternative points of view that have been taken by the main distinguished participants in the dialogue. In keeping with the nature of the assignment, every effort will be made to remain objective. However, in fairness, it would seem appropriate for you to know that whatever biases that do come to the surface will be oriented in favor of plaintiffs.

The various bills that have been introduced by Senator Tydings are but the latest manifestations of a historically long-enduring concern about uniformity of substantive law to be applied to the adjudication of rights and liabilities of individuals and institutions in regard to aviation activities.

Even before the success of the Wright Brothers at Kitty Hawk, lawyers in this country and abroad were concerned about the adequacy of common-law rules and procedures to adequately adjudicate the anticipated legal disputes.¹ In 1922, there emerged the Uniform State Law for Aeronautics. Although it did not deal specifically with the question of the liability of the aviation industry to passengers or to the heirs of passengers, it was a manifestation of the desire for national uniformity in this area of the law. That act was adopted by more than 24 states. The provisions of the 1922 Uniform State Law were re-examined by various legal groups, and in 1938, the National Commissioners on Uniform State Laws adopted a new code. That code contained the Uniform Aviation Liability Act as well as the Uniform Air Jurisdiction Act. This code was strongly opposed by most aviation interests.² Commencing in late 1938, the various provisions of the 1938 Uniform Code were studied by the embryonic Civil Aeronautics Authority. By reason of World War II, the Uniform Acts lost their urgency and no definitive action was taken. In 1943, the Uni-

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¹ See Sweeney, *Is special aviation liability legislation essential?*, 19 J. AIR L. & COM. 166 (1952).

² *Id.* The text of that Code will be found in 9 J. AIR L. & COM. 726-44 (1940).

form Aviation Liability Act was withdrawn by the commissioners.³ In 1956, a special committee, that had been appointed by the National Commissioners, recommended that a new aeronautical code be drafted as there was reason to believe a federal legislative program might be forthcoming.⁴

The questions of the necessity and desirability of a uniform body of law to govern the rights and liabilities of individuals and institutions in the area of aviation activity have been the subject of concern of various legal writers for over 30 years.⁵

The latest legislative round in this area began on 10 April 1968, when Senator Tydings introduced Senate Bills 3305 and 3306. In 1968, hearings before the Subcommittee on Improvements in Judicial Machinery of the United States Senate Committee on the Judiciary were held in regard to those two bills. As a result of opinions expressed at those hearings, and various written statements submitted to the subcommittee, 3305 and 3306 were redrafted, and Senator Tydings submitted Senate Bill 4089 on 27 September 1968. Further redrafting occurred, and on 7 February 1969, Senate Bill 961 was introduced by Senator Tydings. Hearings were held on that Bill before the same subcommittee on 18 March 1969.

Since the 1969 hearing, the draftsmen have recommended to Senator Tydings certain revisions to 961. To date, they have not been incorporated into a later bill. Consequently, this discussion will be restricted to the provisions of Senate Bill 961 and the various positions that have been taken by the distinguished members of the aviation accident litigation community.

For the purpose of analysis, let us divide the provisions of 961 into two categories. First, we will look at those provisions that deal with the substantive law of aviation accident litigation, and second, we will turn to those portions of the bill that deal with procedural matters.

Senate Bill 961 would add Chapter 174 to Title 28 of the United States Code which would contain the bulk of the substantive law provisions. That chapter would create a uniform body of federal law governing all civil legal relations and acts arising out of any aviation or space activity. This body of law would be exclusive of any other law of any state, territory, or possession of the United States, including Puerto Rico, and the District of Columbia. Also, it would be exclusive of maritime law. More specifically, this law would establish the rights and liabilities of all parties as a result of aircraft accidents occurring on the land, in the territorial and inland waters of the United States and its possessions or on the high seas. It should be noted that the bill does not specifically extend its

³ Note, *Conflict of Laws—Desirability of Federal Legislation—Commercial Aviation*, 18 VAND. L. REV. 1632, 1635 (1965).

⁴ *Id.*

⁵ See Rhyne, *Aviation Accident Law*, 138 (1947); Sweeney, *Report to the Civil Aeronautics Board of a Study of Proposed Aviation Liability Legislation* (1941); Hardman, *Aircraft Passenger Accident Law, A Reappraisal*, 1961 INS. L.J. 688; Kuehn, *Uniform State Aviation Liability Legislation*, 1948 WISC. L. REV. 356; Plaine, *State Aviation Legislation*, 14 J. AIR L. & COM. 33, 343 (1947); Bukler, *Limitation of Air Carrier Tort Liability and Related Insurance Coverage—A Proposed Federal Air Passenger Liability Act*, 11 AIR L. REV. 262 (1940); Knauth, *The Uniform State Aeronautics Liability Act Adopted at Cleveland*, 9 AIR L. REV. 352 (1940).

applicability to accidents occurring on the territorial or inland waters or upon the lands of foreign states. The bill further provides that the more specific rules of law of this uniform body of federal law shall be ascertained from decisions of courts of competent jurisdiction in cases or controversies. Also, such rules would be subject to any other applicable federal law or regulation having the force of law or treaty or other agreement having the force of a treaty. By use of the language "regulation having the force of law," it can be inferred that Senate Bill 961 would authorize the Federal Aviation Administration (FAA) or the Civil Aeronautics Board (CAB) to alter or change these rules of law by promulgation of Federal Aviation Regulations.

Chapter 174 would create a cause of action for personal injury, property damage, and wrongful death arising from any aviation or space activity. The cause of action for wrongful death would be patterned after the familiar Death on the High Seas Act.⁶ The cause of action would vest in the decedent's surviving spouse, children, parents, or dependent relatives and the measure of damages would be a fair and just compensation for the pecuniary loss sustained by those heirs. Hence, the bill would incorporate the Lord Campbell's Act⁷ measure of damages.

In the event the decedent survives the accident for a period of time, the bill specifically provides for survival of the right of action for personal injuries of the decedent. However, the measure of damages in such an action would exclude any damages for pain, suffering or disfigurement.

Finally, on the question of damages, the bill specifically prohibits any maximum limitation on the amount of damages recoverable under Chapter 174, except as otherwise limited by treaty or other international agreement having the force of a treaty. Hence, the Warsaw Convention⁸ limitation, and presumably the Interim Agreement limitation,⁹ would still be applicable in regard to international air transportation. Also, any limitation created by other federal law or regulation having the force of law would be applicable. Consequently, it would appear that Senate Bill 961 would authorize the FAA or the CAB to promulgate regulations dealing with tort damage limitations.

Chapter 174 would also create a right of contribution between joint tortfeasors with the amounts of the contribution to be apportioned in accordance with the relative gravity of their breach of duty.

Further, the bill specifically provides that the contributory negligence doctrine followed by the majority of states would be an affirmative defense. However, it should be noted that originally Senate Bill 3306 provided for application of the doctrine of comparative negligence. Also, it should be noted that there is no specific provision for the application of the affirmative defense of assumption of risk in aviation activity litigation.

Finally, in regard to the substantive law provisions of Senate Bill 961,

⁶ 46 U.S.C. §§ 761-67 (1964).

⁷ 9 & 10 Vict. c. 93 (1846).

⁸ Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), 13 Feb. 1933, 49 Stat. 3000, T.S. No. 876 (Effective 29 Oct. 1934).

⁹ 49 Stat. § 3019 (1934).

the applicable period of limitation within which to commence an action would be one year after the right of action accrued. The two year period within which to commence a Federal Tort Claim Act¹⁰ action arising from an aviation or space activity would be reduced to one year.

Substantial controversy has emerged in regard to those substantive law provisions. Needless to say, the sponsors of the various bills have strongly argued that there is a great need to provide a uniform federal law in this area. Their argument is that there is a necessity for predictability of the applicable law and of the reasonably expectable consequences of aviation accidents.¹¹ Their view is that without regard to the applicable conflicts of law rule, there should be jurisprudential uniformity. By way of analogy, they suggest that if it makes sense to have national uniformity of law in maritime activity, then it would make equal sense to have a uniform law for aviation and space activity.

Heretofore, the dialogue has centered primarily on litigation arising from commercial aircraft accidents. It should be noted that Chapter 174 would also unify the applicable law in regard to general and military aviation accident litigation. Hence, as to all such aviation accident litigation, the limits on wrongful death damages imposed by some jurisdictions would be abolished.¹² Further, it should be noted that since Chapter 174 would not provide for a reduced standard of care as to gratuitous riders in aircraft, that by operation of the Supremacy Clause of the United States Constitution, the aviation guest rules of law in the 17 jurisdictions where they prevail would be abolished.¹³

During the initial consideration of this proposed regime of law, there was relatively little opposition to the concept of unification of the substantive law.¹⁴ However, as Senate Bills 3305 and 3306 went through the evolutionary modification process, opposition began to develop to the concept of a uniform federal law.¹⁵ Basically, the argument against such unification is that traditionally our tort system has recognized the efficacy and wisdom of flexibility in legal reform created by our federalism. The various independent jurisdictions are free to shape and mold their jurisprudence in accordance with their view of the better rule of law. Cited as

¹⁰ 45 U.S.C. §§ 51-60 (1964).

¹¹ See Tydings, *Air Crash Litigation: A Judicial Problem and a Congressional Solution*, 18 AM. U. L. REV. 299, 301-02 (1969).

¹² Colorado (COLO. REV. STAT. ANN. § 41-1-3 (1963) \$35,000.00); Kansas (KAN. GEN. STAT. ANN. § 60-1903 (1961) \$35,000.00); Massachusetts (MASS. GEN. LAWS ANN. ch. 229, § 2 (1951) \$50,000.00); Minnesota (MINN. STAT. ANN. § 573.02 (1947) \$35,000.00); Missouri (MO. STAT. ANN. § 537.090 (1964) \$50,000.00); New Hampshire (N.H. REV. STAT. ANN. § 556.13 (1964) \$60,000.00); Virginia (VA. CODE ANN. § 8-636 (1950) \$75,500.00); West Virginia (WEST VA. CODE § 55-7-6 (1966) \$110,000.00) plus reasonably funeral and medical expenses; Wisconsin (WIS. STAT. ANN. § 895.04 (1964) \$40,000.00).

¹³ The following jurisdictions have enacted aviation guest statutes: Arkansas, California, Delaware, Idaho, Illinois, Indiana, Michigan, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oregon, South Carolina, South Dakota and Utah. Georgia provides a reduced standard of care as to gratuitous riders by application of common law principles.

¹⁴ See *Hearings on Aircraft Crash Liability before the Subcommittee on Improvement in Judicial Machinery of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess. 68 (1968), (Hereinafter cited as 1968 Hearings).

¹⁵ See *Hearings on Aircraft Crash Liability before the Subcommittee on Improvement in Judicial Machinery of the Senate Committee on the Judiciary*, 91st Cong., 1st Sess. 240-41 (1969), (Hereinafter cited as 1969 Hearings).

an example of the benefits to be derived from this federalistic flexibility is the emergence of the doctrine of strict liability in tort as applied to air-frame and component parts manufacturers.¹⁶ The opponents argue that this beneficial development was the result of the freedom of one or two states to create substantive law according to their notions of a sound jurisprudence.

Before turning to the pros and cons of other aspects of the substantive law provisions of Chapter 174, it is interesting to note that there has been substantial agreement that arbitrary maximum limitations on wrongful death damages have little place in aviation accident litigation.¹⁷ Similarly, there has been some unanimity in regard to the better affirmative defense doctrine to be applied. As indicated earlier, Senate Bill 3306 expressly applied the doctrine of comparative negligence. That rule was changed when Senate Bill 961 was drafted, and the selection was that of contributory negligence.

So far as the written record indicates, there has been no strong argument made for the doctrine of contributory negligence. To the contrary, various spokesmen for the aviation industry have approved the doctrine of comparative negligence.¹⁸ The opponents contend that comparative negligence is a more fair and just rule of law. They argue that it is patently unfair to deny a victim any recovery when his wrongdoing may have only been a small portion of the causal factors for the accident. Finally, they could point out that juries in those states that have already adopted comparative negligence have seemed to be able to distribute fault.

There has been great dispute over the length of the period of limitation within which to commence an action. Senate Bill 961 provides for a one-year limitation period. The proponents argue that since some states in the union have such a period of limitation, plaintiffs can learn to live with them. Further, they contend that not until all suits are filed can consolidated and coordinated discovery and adjudication proceed in an orderly fashion. The draftsmen of the various Tydings Bills suggest that to overcome any disadvantages of the one-year limitation period, the Judicial Panel on Multi-District Litigation and the transferee court should be authorized to prepare a notice to be sent to all potential claimants prior to the running of the limitation period. Such a notice would advise the claimants that they may have a cause of action and they should consult counsel within the period of limitation.¹⁹ Needless to say, the one-year limitation has been attacked as being too short. By analogy, the opponents argue that the two-year limitation found in the Federal Tort Claims Act²⁰ and the Death on the High Seas Act²¹ is a more appropriate length of time. Further, they argue that claimants place great reliance upon the findings of the National Transportation Safety Board and that since it often occurs that

¹⁶ 1969 *Hearings* at 244-47.

¹⁷ 1968 *Hearings* at 63, 68, 165; 1969 *Hearings* at 263.

¹⁸ 1968 *Hearings* at 84.

¹⁹ 1968 *Hearings* at 49.

²⁰ 45 U.S.C. § 60 (1964).

²¹ 46 U.S.C. § 767 (1964).

the Board's report is not available to the public for more than 12 months, that the limitation should be extended.²²

Generally, it is safe to say that the primary purpose of the proponents is to get as many possible of the cases arising from commercial aircraft accidents into the federal courts so that they could be transferred to one district for the purpose of pretrial preparation and trial on the issue of liability.²³ The initial step to achieve this goal is the creation of exclusive federal subject matter jurisdiction. Initially Bills 3305 and 3306 created exclusive subject matter jurisdiction in most cases arising from an aviation accident. However, the draftsmen modified those provisions and Senate Bill 961 provides for exclusive federal subject matter jurisdiction only as to those actions that arise out of flight, take-off or landing of aircraft that are engaged in carriage as a common carrier for compensation or hire or where the aircraft has a seating capacity of more than 10 persons. Also, exclusive subject matter jurisdiction would exist where the accident proximately resulted in the death of or personal injury to five or more persons.

Generally, there would be concurrent state and federal subject matter jurisdiction for all other actions arising from aviation activity, except that the draftsmen did not intend to alter the existing exclusive jurisdiction provisions for actions commenced against the United States under the Federal Tort Claims Act.²⁴

Along these procedural lines, the venue provisions of Title 28 would be expanded to allow plaintiffs to commence suit in the district wherein plaintiff resides or has his principal place of business. Further, in regard to actions against the United States that fall within the provisions of Chapter 174, venue would lie in any judicial district. Also, plaintiffs would be able to effect service of process upon the defendants throughout the jurisdiction of the United States. Likewise, a subpoena for attendance at a hearing or trial could be served anyplace.

Senate Bill 961 would add Section 1408 to Title 28 of the United States Code. That section would expand the scope of the existing Section 1407. Whereas 1407 applies only to transfer for the purposes of pre-trial discovery and pre-trial motions, Section 1408 would allow transfer of a case to any judicial district for any and all purposes. It would authorize re-transfer to the original district at any time in the proceeding and in regard to any claim or issue in the litigation. Hence, Section 1408 would create the statutory authority for unlimited transfer to the most appropriate district for the conduct of pre-trial discovery and trial upon the issue of liability. Subsequently, counsel for plaintiffs would have the option of moving for re-transfer to the original district for the trial on the issue of damages.

Finally, Senate Bill 961 would leave untouched the requirement in federal court of a unanimous verdict in a jury trial.

As one would imagine, these provisions for virtually unlimited transfer

²² 1968 *Hearings* at 68, 154, 170; 1969 *Hearings* at 248, 259, 261.

²³ Tydings, *supra*, at 313-14.

²⁴ Tydings, *supra*, at 311.

and exclusive federal subject matter jurisdiction have generated substantial differences of opinion. The proponents have argued that in regard to commercial aviation accident litigation, there should be exclusive federal subject matter jurisdiction so that the administration of justice can be speedy, uniform and efficient.²⁵

Great disagreement exists as to whether even the present rules for transfer and consolidation have a detrimental effect upon speedy settlement of claims arising from commercial aviation accidents. Proponents of the bill argue that transfer and consolidation have no real impact upon the desirability of speedy settlement. They contend that other factors are more determinative.²⁶ On the other hand, opponents argue that historically settlements were effected much sooner prior to the current provisions in Title 28 for transfer and consolidation. Therefore, the provisions of Senate Bill 961 would simply add further complications and increase the delay in settling these claims. Their rationale is that prior to consolidation, the natural litigation forces upon all parties encouraged early settlement on an isolated case by case basis. Now, where all cases are thrown into foreign districts, defendants are disinclined to settle one case without reaching agreement on all the cases as they do not want to set an unfavorable pattern of settlement.²⁷

Finally, on the question of transfer and consolidation, the opponents have argued that before we modify the existing provision and procedures under Section 1407, we should allow that section and the Judicial Panel on Multidistrict Litigation to work in the area of commercial aviation accident litigation to see if the result is speedier and more efficient adjudication of claims.

Exclusive federal subject matter jurisdiction has also been challenged on the ground that whereas before plaintiffs merely faced a non-unanimous jury in many state courts, they now must persuade all 12 men, good and true, before a verdict is theirs.²⁸ Their major premise is simply that plaintiffs are better off if it is not necessary for them to persuade each and every juror. Further, they point out that in at least 25 jurisdictions in the United States, the plaintiffs would merely face a non-unanimous jury in state courts.²⁹

So much for the review of the specific substantive and procedural provisions of Senate Bill 961. As a result of events in the last few weeks, we have been advised by the staff of Senator Tydings that a bill comparable to Senate Bill 961 will not be introduced into this session of the United States Congress. However, if Senator Tydings is re-elected in November, his staff has indicated that such a bill would be introduced in the next Congress.

²⁵ 1968 *Hearings* at 125, 132, 140; 1969 *Hearings* at 199; see also Tydings, *supra* 307.

²⁶ 1969 *Hearings* at 258-60.

²⁷ 1968 *Hearings* at 163, 169, 174-76; 1969 *Hearings* at 239.

²⁸ 1969 *Hearings* at 256.

²⁹ The following states permit nonunanimous civil jury verdicts: Alaska, Arizona, Arkansas, California, Hawaii, Idaho, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington and Wisconsin.

Further, there is every reason to believe that the most immediate question that will be before the Aviation Accident Litigation Bar is not whether there shall or shall not be a uniform federal law and exclusive federal subject matter jurisdiction. On the other hand, by reason of the events in Montreal in regard to the Warsaw Convention, and the present activities within the United States Justice Department, the immediate question may become whether we should or should not have absolute enterprise liability in domestic and international commercial air transportation with a maximum limit on damages. Needless to say, that subject matter goes far beyond the scope of this article. It should be noted, however, that the proponents of Senate Bill 961 carefully attempted to avoid linking the bill with considerations of major alteration of our tort system and the advisability of absolute liability.³⁰ Be that as it may, there is reason to believe that the two have become intertwined.

If we assume that the future rule will be absolute liability with some limitation on damages, the need for national and international uniformity of substantive law will not be satisfied. Absolute liability in domestic and international air transportation would not resolve the question of the applicable measure of damages in those situations where just compensation would not exceed the statutory maximum limitation. In those cases, a choice of the applicable measure of damages would still have to be made. The trial bar and bench would still be faced with the complex and often perplexing choice of law considerations presently existing in general and military aviation accident litigation involving multi-state contacts. Nor would absolute liability solve the choice of law problems in litigation involving air taxi or third level air carriers.

Therefore, my opinion is that absolute enterprise liability, if it is to be adopted, will not solve the serious question of whether we should or should not have a uniform aerospace accident law. As the impending debate waxes hot and cold on the question of absolute liability, I urge you not to lose sight of the question of jurisprudence uniformity.

³⁰ 1968 *Hearings* at 43; Tydings, *supra*, at 312.